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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL IAN CONWAY, Defendant and Appellant.	F059633 (Super. Ct. No. SCR009853A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. Charles A. Wieland, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Cornell, Acting P.J., Dawson, J., and Kane, J.

STATEMENT OF THE CASE

On December 3, 2009, appellant, Michael Ian Conway, waived his constitutional rights and pled no contest to receiving stolen property (Pen. Code, § 496, subd. (a), count two).[1] In return for appellant's change of plea, a second degree burglary allegation (§ 211) was dismissed, and appellant faced the upper term sentence of three years.

On January 7, 2010, the trial court sentenced appellant to the upper prison term of three years. Appellant received custody credits of 159 days. Appellant contends he is entitled to extra custody credits under the recently amended provisions of section 4019.[2] We disagree and will affirm the judgment.

ADDITIONAL CUSTODY CREDITS

Appellant contends he is entitled to additional custody credits from the amended version of section 4019 that became effective January 25, 2010. (Stats. 2009-2010, 3d Ex. Sess. 2009, ch. 28, § 50 (Sen. Bill 18XXX).)[3] Although appellant has a lengthy criminal record, from the probation officer's accounting of appellant's past convictions, he does not have a conviction for a serious or violent felony as defined in section 1192.7, subdivision (c), and section 667.5, subdivision (c). Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In

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1 Unless otherwise designated, all statutory references are to the Penal Code.

2 Because the only issue on appeal concerns appellant's custody credits, we do not recount the underlying facts of appellant's offenses. We note that although the criminal complaint indicates appellant has a history of felony offenses, appellant does not apparently have a serious or violent felony conviction that would disqualify him from the provisions of section 4019, if it is found to apply retroactively.

3 The legislature has again amended section 4019, this time effective September 28, 2010, and this time expressly prospective-only. (Stats. 2010, ch. 426, § 2 (Sen. Bill 76).) The amendment restores the credit scheme that existed prior to the amendment upon which appellant relies here.

addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

When appellant was sentenced on January 7, 2010, the court calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019, effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7, or a violent felony as defined in section 667.5, subdivision (c), may accrue additional conduct credits. We conclude the amendment applies prospectively only.[4]

Under section 3, it is presumed that a statute operates prospectively "'absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application]. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) The Legislature neither expressly declared, nor does it appear by """clear and compelling implication""" from any other factor(s), that it intended the amendment operate retroactively. (*Id*. at p. 754.) Therefore, the amendment applies prospectively only.

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4 We decide this case according to our opinion in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, which is currently before the California Supreme Court, along with its companion case, *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 4019.

We further conclude that prospective-only application of the amendment does not violate appellant's equal protection rights. One of section 4019's principal purposes, both as formerly written and as amended, is to motivate good conduct. Appellant and those like him who were sentenced prior to the effective date of the amendment cannot be further enticed to behave themselves during their presentence custody. The fact that a defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the amendment only apply prospectively.

Because (1) the amendment evinces a legislative intent to increase the incentive for good conduct during presentence confinement, and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

DISPOSITION

The judgment is affirmed.